APPENDIX A

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

JOHN J. FELLERS,
Appellant.

No. 01-2045

Submitted: Sept. 13, 2004
Filed: Feb. 15, 2005

[397 F.3d 1090]

Before WOLLMAN, LAY, and RILEY, Circuit Judges.

WOLLMAN, Circuit Judge.

This case returns to us on remand from the Supreme Court. We affirm Fellers's conviction, but remand to the district court for resentencing.

I.

Two policemen went to Fellers's home in Lincoln, Nebraska, to arrest him on February 24, 2000. After the officers entered the home, they told Fellers that a grand jury had indicted him for conspiracy to distribute methamphetamine, that the indictment concerned an alleged conspiracy with certain named persons, and that the officers had a federal warrant for his arrest. Fellers stated that he knew the co-conspirators in question and that he had used methamphetamine in the past.

After about 15 minutes, the officers arrested Fellers and transported him to jail. Fellers was booked and taken to an interview room, where the officers gave him a full

Miranda warning. Fellers waived his *Miranda* rights both verbally and in writing, repeated the statements he had made at his home, and stated that he had purchased methamphetamine from some of the co-conspirators named in the indictment. Fellers admitted knowing several more individuals and that he had purchased methamphetamine from some of them and used methamphetamine with some of them. He also stated that he had loaned money to another co-conspirator even though he suspected that the money might have been used for drug transactions. Throughout his jailhouse interrogation, however, Fellers repeatedly denied that he had ever sold methamphetamine.

Following a magistrate judge's hearing and recommendation, the district court suppressed the statements made at Fellers's **[1093]** home, but allowed Fellers's jailhouse statements to be introduced at trial. A jury found Fellers guilty of conspiracy to distribute and to possess with intent to distribute between 50 and 500 grams of methamphetamine. At sentencing, over Fellers's objection, the district court found that Fellers was actually responsible for more than 500 grams of methamphetamine and accordingly raised Fellers's base offense level from 30 to 32. The district court also raised Fellers's criminal history category from category II to category III based upon conduct underlying a prior guilty plea, even though the conviction entered pursuant to the plea was later expunged.

We upheld Fellers's conviction against Fifth and Sixth Amendment challenges and held that Fellers's jailhouse statements were admissible under *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). *United States v. Fellers*, 285 F.3d 721, 724 (8th Cir. 2002) (*Fellers I*). The Supreme Court reversed our decision and concluded that the officers had deliberately elicited the statements made at Fellers's home in violation of Fellers's Sixth Amendment right to counsel. *Fellers v. United States*, 540 U.S. 519, 524-25, 124 S.Ct. 1019, 157 L.Ed.2d 1016 (2004) (*Fellers II*). The Court remanded the case to us for a determination whether Fellers's jailhouse statements should

be suppressed as fruits of the initial Sixth Amendment violation and whether the *Oregon v. Elstad* rationale "applies when a suspect makes incriminating statements after a knowing and voluntary waiver of his right to counsel notwithstanding earlier police questioning in violation of Sixth Amendment standards." *Id.* at 525, 124 S.Ct. 1019.

II.

Fellers argues that *Elstad* does not apply to violations of the Sixth Amendment because the *Elstad* rule was never designed to deal with actual violations of the Constitution. In addition, Fellers argues that *Elstad*—which was crafted to serve the Fifth Amendment—is inapplicable because it is ill-suited to serve the distinct concerns raised by the Sixth Amendment and because violations of the *Miranda* rule are fundamentally different from the Sixth Amendment violation at issue in this case. We disagree.

A.

In *Elstad*, the Supreme Court held that an initial failure to administer *Miranda* warnings, in the absence of actual coercion or tactics calculated to undermine an individual's free will, does not require the suppression of subsequent voluntary statements given after proper *Miranda* warnings and a valid waiver of *Miranda* rights. *Elstad*, 470 U.S. at 309, 105 S.Ct. 1285. Two policemen went to Elstad's home with a warrant for his arrest for burglary. While in Elstad's living room, one of the officers told Elstad that he believed that Elstad was involved in the burglary. Elstad responded, "Yes, I was there." The officers then took Elstad to the county sheriff's office and advised him of his *Miranda* rights approximately one hour later. Elstad indicated that he understood his rights and wished to waive them and speak with the officers. Elstad then gave and signed a full written statement regarding his involvement in the burglary. The trial court suppressed the initial statement made at Elstad's home, but admitted Elstad's signed, written confession. *Id.* at 300-02, 105 S.Ct. 1285. The Supreme Court affirmed the trial court's decision and held that the "fruit of the poisonous

tree" doctrine, which would have excluded the subsequent confession if it were tainted by the initial *Miranda* violation, was inapplicable in the *Miranda* context. *Id.* at 306-07, 105 S.Ct. 1285.

[1094] The Supreme Court stated in *Elstad* that its rejection of the exclusionary rule in the *Miranda* context was premised on the fact that a violation of *Miranda* was not, by itself, a violation of the Fifth Amendment and on the fact that the protections afforded by the *Miranda* rule sweep more broadly than the Fifth Amendment itself. *See id.* at 305-07, 105 S.Ct. 1285 ("Respondent's contention that his confession ... must be excluded as 'fruit of the poisonous tree' assumes the existence of a constitutional violation."). The Court also stated that *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), stands for the proposition that constitutional violations mandate application of the fruits doctrine. *Elstad*, 470 U.S. at 308-09, 105 S.Ct. 1285. This justification for *Elstad*'s holding, however, was undercut by the Court in *Dickerson v. United States*, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). In *Dickerson*, the Court held that *Elstad*'s rationale rested not on the fact that *Miranda* was not a constitutionally mandated rule, but instead on the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment. *Id.* at 441, 120 S.Ct. 2326. Additionally, we have interpreted *Dickerson* as "reaffirm[ing] the validity of *Elstad* by reaffirming the distinction between application of the exclusionary rule following Fourth and Fifth Amendment violations." *United States v. Villalba-Alvarado*, 345 F.3d 1007, 1012 (8th Cir. 2003).[1]

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[1] In *Chavez v. Martinez*, 538 U.S. 760, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003), a majority of the Supreme Court concluded that a *Miranda* violation does not, without more, establish a completed violation of the Fifth Amendment. *Id.* at 772, 123 S.Ct. 1994 (plurality opinion), 538 U.S. at 789, 123 S.Ct. 1994 (Kennedy, J., concurring in part and dissenting in part). Neither opinion contradicts *Dickerson*'s analysis of *Elstad*'s constitutional underpinnings.

B.

Whether the exclusionary rule applies to evidence acquired subsequent to a constitutional violation requires consideration of the possible admissibility of the evidence in light of the "distinct policies and interests" of each Amendment. *See Elstad*, 470 U.S. at 306-07, 105 S.Ct. 1285; *Brown v. Illinois*, 422 U.S. 590, 602, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). When applied to a confession that is the fruit of unlawful police conduct, the exclusionary rule ensures that the fruits are excluded from trial unless they result from an "intervening act of free will" by the suspect. *Wong Sun*, 371 U.S. at 486, 83 S.Ct. 407.

Although the exclusionary rule is most often applied in the Fourth Amendment context, its application has not been limited to Fourth Amendment violations. *Nix v. Williams*, 467 U.S. 431, 442 & n.3, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984). The Supreme Court instead has applied the exclusionary rule to violations of both the Fifth and Sixth Amendment. *Id.* The Court has repeatedly noted, however, that the core reason for extending the exclusionary rule to these areas is to deter police from violating constitutional and statutory protections. *Id.* at 442-43, 104 S.Ct. 2501. *See also United States v. Patane*, --- U.S. ----, ----, 124 S.Ct. 2620, 2629, 159 L.Ed.2d 667 (2004) (plurality opinion). Another relevant consideration in extending the exclusionary rule is whether application of the rule would effectuate the purposes of the constitutional provision at issue. *See Brown*, 422 U.S. at 601, 95 S.Ct. 2254.

The Fourth Amendment traditionally mandates a "broad application" of the exclusionary rule. *Elstad*, 470 U.S. at 306, 105 S.Ct. 1285. The exclusionary rule **[1095]** operates in the Fourth Amendment context to deter unreasonable searches and seizures regardless of the probativeness of their fruits. *Id.* Where the fruits of the Fourth Amendment violation are confessions, courts apply the exclusionary rule to ensure that the confession is not causally linked to the initial illegality. *Brown*, 422 U.S. at 602-03, 95 S.Ct. 2254. By applying the exclusionary rule, courts "assure in every case

that the Fourth Amendment violation has not been unduly exploited," and thus effectuate the Fourth Amendment's purpose of prohibiting unreasonable searches and seizures. *Id.* at 603, 95 S.Ct. 2254. *Miranda* warnings do not obviate the need for the exclusionary rule in the Fourth Amendment context because the warnings cannot, "alone and per se," ensure that a voluntary confession taken subsequent to a Fourth Amendment violation was an act of free will sufficient to break the causal connection between the violation and the confession. *Id.*

The Fifth Amendment, in contrast, prohibits the prosecution from using compelled testimony in its case in chief and ensures that any evidence introduced at trial will be voluntary and thus trustworthy. *Elstad*, 470 U.S. at 306-08, 105 S.Ct. 1285. Because confessions or statements taken in violation of *Miranda* give rise to an irrebuttable presumption that they have been compelled, they must be excluded from the prosecution's case in chief. *Id.* at 307, 105 S.Ct. 1285. This presumption of compulsion, however, does not bar the use of unwarned statements for impeachment purposes. *Id.* In addition, as *Elstad* held, the presumption does not preclude the introduction of a subsequent warned statement at trial. *Id.* at 310-11, 105 S.Ct. 1285. Because the *Miranda* warnings give the suspect the information he needs to choose whether to exercise his right to remain silent, the suspect's choice to speak after receiving *Miranda* warnings is normally viewed as an "act of free will." *Id.* at 311, 105 S.Ct. 1285 (quoting *Wong Sun*, 371 U.S. at 486, 83 S.Ct. 407). Furthermore, because the introduction of the subsequent warned statement at trial entails no risk that compelled testimony will be used against a suspect, suppression of the subsequent warned statement neither deters violations of the Fifth Amendment nor ensures that the statement was not compelled. *Id.* at 308-09, 83 S.Ct. 407. Accordingly, the ordinary exclusionary rule gives way to the *Elstad* rule, and subsequent warned confessions given after initial *Miranda* violations are admissible.

The Sixth Amendment prohibits the use at trial of statements deliberately elicited from a suspect after he has been indicted and in the absence of counsel. *Massiah v. United States*, 377 U.S. 201, 206, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). This rule serves to exclude uncounseled post-indictment statements taken in violation of the Sixth Amendment and thereby preserves the integrity and fairness of the criminal trial. *See Nix*, 467 U.S. at 446, 104 S.Ct. 2501.

We conclude that the exclusionary rule is inapplicable in Fellers's case because, as with the Fifth Amendment in *Elstad*, the use of the exclusionary rule in this case would serve neither deterrence nor any other goal of the Sixth Amendment. Both the deterrence of future Sixth Amendment violations and the vindication of the Amendment's right-to-counsel guarantee have been effectuated through the exclusion of Fellers's initial statements. Although the officers acknowledged that they used Fellers's initial jailhouse statements (obtained after securing a *Miranda* waiver) in order to extract further admissions from him, there is no indication that the interrogating officers made any reference to Fellers's prior uncounseled statements in order to prompt **[1096]** him into making new incriminating statements. In addition, because Fellers's initial statements related to persons already named in the indictment and to his own personal use of methamphetamine (the drug he was accused of conspiring to distribute and to possess with intent to distribute), the officers would have had a basis for the questions asked during the jailhouse interrogation even if Fellers had said nothing at all at his home. Furthermore, although Fellers's subsequent statements did reestablish matters addressed by his prior unwarned statements, Fellers also made numerous statements about parties, events, and activities not covered in his prior statements. Accordingly, suppression of Fellers's subsequent statements would not promote the fairness of the trial process because their introduction was not unfair to Fellers.

Our conclusion is consistent with historical applications of the exclusionary rule in the Sixth Amendment context. In such cases, evidence acquired after a Sixth Amendment violation is excluded in the absence of proof that the Sixth Amendment violation did not contribute to or produce the subsequent evidence. *See, e.g., United States v. Wade*, 388 U.S. 218, 235-37, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (excluding identification testimony given subsequent to a post-indictment lineup at which the accused's counsel was not present in violation of the Sixth Amendment). In the case of warned confessions that follow unwarned, uncounseled statements, however, the suspect's knowing, intelligent, and voluntary choice to waive his right to counsel constitutes an intervening act of free will that breaks the causal link between the prior uncounseled statements (which have already been suppressed) and the subsequent statements.

C.

The similarities between the Sixth Amendment context at issue in Fellers's case and the Fifth Amendment context at issue in *Elstad* support our conclusion that the *Elstad* rule applies when a suspect makes incriminating statements after a knowing and voluntary waiver of his right to counsel, notwithstanding earlier police questioning in violation of the Sixth Amendment. Although the Supreme Court has never explicitly stated that the *Elstad* rationale is applicable to Sixth Amendment violations, it has emphasized the similarity between pre-indictment suspects subjected to custodial interrogation and post-indictment defendants subjected to questioning.

The Court has held that the scope of the right to counsel varies depending upon the usefulness of counsel to the accused at a particular proceeding and the dangers to the accused of proceeding without counsel. *Patterson v. Illinois*, 487 U.S. 285, 298, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988). Unlike during trial, where the accused truly requires aid in meeting his legal adversary, the full "dangers and disadvantages of self-representation" during post-indictment questioning are more apparent to an accused. *Id.* at 298-300, 108

S.Ct. 2389. Furthermore, because "[t]he State's decision to take an additional step and commence formal adversarial proceedings against the accused does not substantially increase the value of counsel to the accused at questioning or expand the limited purpose that an attorney serves when the accused is questioned by authorities," there is no significant difference between a lawyer's usefulness to a suspect during pre-indictment custodial interrogation and his usefulness at post-indictment questioning. *Id.* at 298-99, 108 S.Ct. 2389. An accused is thus permitted to waive his right to counsel as an initial matter after **[1097]** receiving proper *Miranda* warnings. *Id.* at 293-94, 108 S.Ct. 2389. Such warnings alert the accused to the possible consequences of going forward without counsel during questioning. *Id.* at 293, 108 S.Ct. 2389. In addition, as in the case of unwarned statements taken in violation of *Miranda*, uncounseled statements obtained in violation of the Sixth Amendment may be used at trial for impeachment purposes. *See Michigan v. Harvey*, 494 U.S. 344, 350-52, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990). Accordingly, a warned post-indictment accused subjected to questioning is similarly situated with a warned pre-indictment suspect subjected to custodial interrogation.

In contrast with the statements made at Fellers's home, Fellers's jailhouse statements were given after a proper administration of *Miranda* warnings and a proper oral and written waiver of his *Miranda* rights. The *Miranda* warnings fully informed Fellers of "the sum and substance" of his Sixth Amendment rights, and his waiver of his *Miranda* rights operated as a knowing, intelligent, and voluntary waiver of his right to counsel. *Patterson*, 487 U.S. at 293-94, 108 S.Ct. 2389. He was thus given all of the information he needed to decide whether to invoke his Sixth Amendment rights.[2] Furthermore, no evidence indicates that either

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[2] Fellers's suggestion that the psychological effect of the first statement inherently taints the second statement or coerces a post-indictment accused into expanding upon statements previously made because the

Fellers's initial statements or his subsequent jailhouse statements were coerced, compelled, or otherwise involuntary. As a result, the condition that made his prior statements inadmissible—the inability to have counsel present or to waive the right to counsel—was removed. *See Elstad*, 470 U.S. at 314, 105 S.Ct. 1285.

The Supreme Court's decision in *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), is not to the contrary. Fellers's Sixth Amendment right to counsel certainly accrued after his indictment, but that fact has no bearing on his ability to waive that right in the first instance. *See Patterson*, 487 U.S. at 290-91, 108 S.Ct. 2389 (fact that suspect's Sixth Amendment right was in existence at time of questioning did not distinguish him from preindictment interrogatee, who also has a right to counsel in existence at time of questioning). Furthermore, *Jackson* does not bar a post-indictment accused from making an *initial* election whether to proceed with questioning through counsel. *Id.* at 291, 108 S.Ct. 2389. Because Fellers initially chose to go forward without counsel, there is no reason to exclude his uncounseled statements. *Id.*

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first statement "let the cat out of the bag" has been squarely rejected by the Supreme Court. In *Elstad*, the Court stated that it had "never held that the psychological impact of voluntary disclosure of a guilty secret . . . compromises the voluntariness of a subsequent informed waiver." *Elstad*, 470 U.S. at 312, 105 S.Ct. 1285. Although the *Elstad* Court addressed the issue in Fifth Amendment terms, its analysis is equally applicable in this case because of the similarities between a pre-indictment suspect subjected to custodial interrogation and a post-indictment accused subjected to questioning. Furthermore, even if Fellers was unaware of the fact that his prior statements could not be used against him, that ignorance did not compromise the voluntariness of his subsequent waiver of the right to counsel. *See id.* at 316, 105 S.Ct. 1285 ("This Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness."); *see also Patterson*, 487 U.S. at 297, 108 S.Ct. 2389.

D.

Finally, we conclude that the officers' conduct in this case did not vitiate the effectiveness of the *Miranda* warnings given **[1098]** to Fellers. We apply a multi-factor test derived from the Supreme Court's recent plurality opinion in *Missouri v. Seibert*, --- U.S. ----, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004), in order to determine whether *Miranda* warnings delivered between two interrogation sessions are sufficient to fully inform a suspect of his *Miranda* rights. *United States v. Aguilar*, 384 F.3d 520, 524 (8th Cir. 2004). We consider: (1) the extent of the first round of interrogation; (2) the extent to which the first and second rounds of interrogation overlap; (3) the timing and setting of both questioning sessions, including whether a continuity of police personnel existed; and (4) the extent to which the interrogator's questions treated the second round as continuous with the first. *Id.*

In Fellers's case, the facts are much closer—if not identical—to the facts at issue in *Elstad* than to the facts at issue in *Seibert* or *Aguilar*. As in *Elstad*, the unwarned conversation at Fellers's home was relatively brief. Although the same officers that deliberately elicited statements from Fellers at his home also conducted Fellers's jailhouse interrogation, that interrogation took place almost one half hour later than the conversation at Fellers's home and in a new and distinct setting. In addition, while Fellers's warned jailhouse statements overlapped to a small degree with his initial unwarned, uncounseled admissions, the jailhouse interrogation went well beyond the scope of Fellers's initial statements by inquiring about different co-conspirators and different allegations. There is also no indication that the officers in this case treated the two rounds of interrogation as continuous, such as by using statements from the unwarned conversation to prompt admissions after receipt of a *Miranda* waiver. *See Seibert*, --- U.S. at ----, 124 S.Ct. at 2606.

These facts are distinguishable from those in *Seibert* and *Aguilar*, where two almost co-extensive interrogations took

place in the same interrogation room with little or no break between them. *See id.* at 2606, 2612 ("When the police were finished there was little, if anything, of incriminating potential left unsaid."); *Aguilar*, 384 F.3d at 525. The subsequent *Miranda* warnings thus presented Fellers with a "new and distinct experience" as well as a "genuine choice whether to follow up on the earlier admission." *Seibert*, 124 at 2612. Given these circumstances, then, to admit Fellers's jailhouse statements is not to fashion a rule that would permit an "end run around *Miranda*." *United States v. Carter*, 884 F.2d 368, 373 (8th Cir. 1989) (discussing situation in which officers obtained unwarned admissions from suspect and obtained identical warned handwritten admissions immediately thereafter).

Fellers's case also comports with Justice Kennedy's concurrence in *Seibert*. --- U.S. at ----, 124 S.Ct. at 2614. *See also United States v. Briones*, 390 F.3d 610, 613 (8th Cir. 2004) ("Because Justice Kennedy relied on grounds narrower than those of the plurality, his opinion is of special significance."). Under Justice Kennedy's framework, the *Elstad* rule applies in the Fifth Amendment context only in the absence of a deliberate law enforcement strategy designed to obtain incriminating statements in violation of *Miranda*. *Briones*, 390 F.3d at 613. Because there is no evidence that the officers in this case employed such a deliberate strategy, the concerns voiced by Justice Kennedy are satisfied.

III.

Even if Fellers's jailhouse statements should have been suppressed, any error in admitting those statements at trial was harmless beyond a reasonable doubt. Although a defendant's own confession is **[1099]** "a particularly potent piece of evidence," its erroneous introduction is harmless where the other evidence against him is so substantial that it "assured beyond a reasonable doubt that the jury would have returned a conviction even absent the confession." *United States v. Santos*, 235 F.3d 1105, 1108 (8th Cir. 2000) (internal citations omitted).

Fellers's jailhouse statements, in which he admitted knowing certain co-conspirators and using methamphetamine with them, were either corroborated by other government witnesses or were immaterial to the case. The testimony of each of these corroborating witnesses went largely unchallenged. Although each of the government witnesses had numerous past convictions, had used illegal drugs extensively for a number of years, and were testifying pursuant to plea bargains in hopes of a reduced sentence (all of which was made known to the jury through both testimony and exhibits), their credibility was for the jury to decide. *See, e.g., United States v. Aguayo-Delgado*, 220 F.3d 926, 935 (8th Cir. 2000).

Furthermore, it is notable that although Fellers admitted to knowing numerous co-conspirators and to using and purchasing methamphetamine, he vehemently denied selling or distributing methamphetamine. Fellers's trial counsel used this fact in his closing argument and intimated that Fellers was not involved in the distribution of methamphetamine because a police officer who was trained to elicit the truth from suspects could not elicit an admission of distribution from Fellers. Accordingly, the introduction of Fellers's jailhouse admissions at worst had no effect on the verdict and at best militated against a conviction for conspiracy to possess methamphetamine with intent to distribute.

To prove conspiracy to distribute or to possess methamphetamine with intent to distribute, "the government must prove that two or more persons reached an agreement to distribute or possess with intent to distribute methamphetamine, that the defendant voluntarily and intentionally joined the agreement, and that at the time that the defendant joined the agreement he knew its essential purpose." *United States v. Aguilar-Portillo*, 334 F.3d 744, 747 (8th Cir. 2003). At trial, the government presented eight witnesses who detailed the extent of the conspiracy as well as Fellers's involvement in both possession and distribution of methamphetamine. Although "a reasonable mind could

entertain concerns about 'the reliability and consistency of these accounts' " given the witnesses' plea bargains, criminal histories, and past drug use, *see id.*, the evidence presented by the government in this case is sufficient to prove that Fellers conspired to possess methamphetamine with intent to distribute. Accordingly, any error in admitting Fellers's jailhouse statements was harmless.

IV.

Fellers last contends that the district court improperly enhanced his sentence based on facts not found by a jury, admitted by him, or proved beyond a reasonable doubt. Specifically, he argues that both the district court's increase of the drug quantity attributable to him beyond that found by the jury and the district court's reliance on facts underlying a prior expunged conviction—as opposed to the fact of the conviction itself—in order to increase his criminal history category violate his Sixth Amendment right to trial by jury.

In its recent decision in *United States v. Booker*, --- U.S. ----, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), the Supreme Court held that the mandatory federal sentencing guidelines system was unconstitutional and that "[a]ny fact (other than a prior conviction) which is necessary to support **[1100]** a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id.* at 755-56. Because the jury in Fellers's case specifically found that Fellers was responsible for between 50 and 500 grams of methamphetamine and specifically rejected an alternative verdict stating that Fellers was responsible for more than 500 grams of methamphetamine, the district court's decision to enhance Fellers's sentence based upon the latter figure was in error. Because Fellers

raised this issue at sentencing, he is entitled to a new sentencing hearing.[3]

Fellers's conviction is affirmed, but his case is remanded for resentencing in accordance with *Booker*.

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[3] Because the district court's enhancement of Fellers's sentence based upon an increased drug quantity entitles him to a resentencing in and of itself, we see no need to decide whether the increase in his criminal history category similarly entitles him to relief. We note, however, that the conduct underlying the expunged offense was admitted by the defendant in the context of a guilty plea.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

JOHN J. FELLERS,
Petitioner,

v.

UNITED STATES

No. 02-6320

Argued Dec. 10, 2003
Decided Jan. 26, 2004

[540 U.S. 519]

Justice O'CONNOR delivered the opinion of the Court.

After a grand jury indicted petitioner John J. Fellers, police officers arrested him at his home. During the course of the arrest, petitioner made several inculpatory statements. **[521]** He argued that the officers deliberately elicited these statements from him outside the presence of counsel, and that the admission at trial of the fruits of those statements therefore violated his Sixth Amendment right to counsel. Petitioner contends that in rejecting this argument, the Court of Appeals for the Eighth Circuit improperly held that the Sixth Amendment right to counsel was "not applicable" because "the officers did not interrogate [petitioner] at his home." 285 F.3d 721, 724 (2002). We granted the petition for a writ of certiorari, 538 U.S. 905, 123 S.Ct. 1480, 155 L.Ed.2d 224 (2003), and now reverse.

I

On February 24, 2000, after a grand jury indicted petitioner for conspiracy to distribute methamphetamine, Lincoln Police Sergeant Michael Garnett and Lancaster County Deputy Sheriff Jeff Bliemeister went to petitioner's home in Lincoln, Nebraska, to arrest him. App. 111. The officers

knocked on petitioner's door and, when petitioner answered, identified themselves and asked if they could come in. *Ibid.* Petitioner invited the officers into his living room. *Ibid.*

The officers advised petitioner they had come to discuss his involvement in methamphetamine distribution. *Id.*, at 112. They informed petitioner that they had a federal warrant for his arrest and that a grand jury had indicted him for conspiracy to distribute methamphetamine. *Ibid.* The officers told petitioner that the indictment referred to his involvement with certain individuals, four of whom they named. *Ibid.* Petitioner then told the officers that he knew the four people and had used methamphetamine during his association with them. *Ibid.*

After spending about 15 minutes in petitioner's home, the officers transported petitioner to the Lancaster County jail. *Ibid.* There, the officers advised petitioner for the first time of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and *Patterson v. Illinois*, 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988). App. 112. Petitioner and the two officers signed a *Miranda* waiver **[522]** form, and petitioner then reiterated the inculpatory statements he had made earlier, admitted to having associated with other individuals implicated in the charged conspiracy, App. 29-39, and admitted to having loaned money to one of them even though he suspected that she was involved in drug transactions, *id.*, at 34.

Before trial, petitioner moved to suppress the inculpatory statements he made at his home and at the county jail. A Magistrate Judge conducted a hearing and recommended that the statements petitioner made at his home be suppressed because the officers had not informed petitioner of his *Miranda* rights. App. 110-111. The Magistrate Judge found that petitioner made the statements in response to the officers' "implici[t] questions," noting that the officers had told petitioner that the purpose of their visit was to discuss his use and distribution of methamphetamine. *Id.*, at 110. The Magistrate Judge further recommended that portions of petitioner's jailhouse statement be suppressed as fruits of

the prior failure to provide *Miranda* warnings. App. 110-111.

The District Court suppressed the "unwarned" statements petitioner made at his house but admitted petitioner's jailhouse statements pursuant to *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), concluding petitioner had knowingly and voluntarily waived his *Miranda* rights before making the statements. App. 112-115.

Following a jury trial at which petitioner's jailhouse statements were admitted into evidence, petitioner was convicted of conspiring to possess with intent to distribute methamphetamine. Petitioner appealed, arguing that his jailhouse statements should have been suppressed as fruits of the statements obtained at his home in violation of the Sixth Amendment. The Court of Appeals affirmed. 285 F.3d 721 (C.A.8 2002). With respect to petitioner's argument that the officers' failure to administer *Miranda* warnings at his home violated his Sixth Amendment right to counsel under **[523]** *Patterson*, *supra*, the Court of Appeals stated: "*Patterson* is not applicable here . . . for the officers did not interrogate [petitioner] at his home." 285 F.3d, at 724. The Court of Appeals also concluded that the statements from the jail were properly admitted under the rule of *Elstad*, *supra*. 285 F.3d, at 724 (" 'Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made' " (quoting *Elstad*, *supra*, at 309, 105 S.Ct. 1285)).

Judge Riley filed a concurring opinion. He concluded that during their conversation at petitioner's home, officers "deliberately elicited incriminating information" from petitioner. 285 F.3d, at 726-727. That "post-indictment conduct outside the presence of counsel," Judge Riley reasoned, violated petitioner's Sixth Amendment rights. *Id.*, at 727. Judge Riley nevertheless concurred in the judgment, concluding that the jailhouse statements were admissible under

the rationale of *Elstad* in light of petitioner's knowing and voluntary waiver of his right to counsel. 285 F.3d, at 727.

II

The Sixth Amendment right to counsel is triggered "at or after the time that judicial proceedings have been initiated . . . 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Brewer v. Williams*, 430 U.S. 387, 398, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972)). We have held that an accused is denied "the basic protections" of the Sixth Amendment "when there [is] used against him at his trial evidence of his own incriminating words, which federal agents . . . deliberately elicited from him after he had been indicted and in the absence of his counsel." *Massiah v. United States*, 377 U.S. 201, 206, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964); cf. *Patterson v. Illinois*, *supra* (holding that the Sixth Amendment does not bar postindictment questioning in the absence of counsel if a defendant waives the right to counsel).

[524] We have consistently applied the deliberate-elicitation standard in subsequent Sixth Amendment cases, *see United States v. Henry*, 447 U.S. 264, 270, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980) ("The question here is whether under the facts of this case a Government agent 'deliberately elicited' incriminating statements . . . within the meaning of *Massiah*"); *Brewer*, *supra*, at 399, 97 S.Ct. 1232 (finding a Sixth Amendment violation where a detective "deliberately and designedly set out to elicit information from [the suspect]"), and we have expressly distinguished this standard from the Fifth Amendment custodial-interrogation standard, *see Michigan v. Jackson*, 475 U.S. 625, 632, n.5, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986) ("[T]he Sixth Amendment provides a right to counsel . . . even when there is no interrogation and no Fifth Amendment applicability"); *Rhode Island v. Innis*, 446 U.S. 291, 300, n.4, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) ("The definitions of 'interrogation' under the Fifth and Sixth Amendments, if indeed the term 'interrogation' is even apt in the Sixth Amendment context, are not necessar-

ily interchangeable"); cf. *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (holding that the Sixth Amendment provides the right to counsel at a postindictment lineup even though the Fifth Amendment is not implicated).

The Court of Appeals erred in holding that the absence of an "interrogation" foreclosed petitioner's claim that the jailhouse statements should have been suppressed as fruits of the statements taken from petitioner at his home. First, there is no question that the officers in this case "deliberately elicited" information from petitioner. Indeed, the officers, upon arriving at petitioner's house, informed him that their purpose in coming was to discuss his involvement in the distribution of methamphetamine and his association with certain charged co-conspirators. 285 F.3d, at 723; App. 112. Because the ensuing discussion took place after petitioner had been indicted, outside the presence of counsel, and in the absence of any waiver of petitioner's Sixth Amendment rights, the Court of Appeals erred in holding that the officers' **[525]** actions did not violate the Sixth Amendment standards established in *Massiah*, *supra*, and its progeny.

Second, because of its erroneous determination that petitioner was not questioned in violation of Sixth Amendment standards, the Court of Appeals improperly conducted its "fruits" analysis under the Fifth Amendment. Specifically, it applied *Elstad*, *supra*, to hold that the admissibility of the jailhouse statements turns solely on whether the statements were "'knowingly and voluntarily made.'" 285 F.3d, at 724 (quoting *Elstad*, *supra*, at 309, 105 S.Ct. 1285). The Court of Appeals did not reach the question whether the Sixth Amendment requires suppression of petitioner's jailhouse statements on the ground that they were the fruits of previous questioning conducted in violation of the Sixth Amendment deliberate-elicitation standard. We have not had occasion to decide whether the rationale of *Elstad* applies when a suspect makes incriminating statements after a knowing and voluntary waiver of his right to counsel notwithstanding ear-

lier police questioning in violation of Sixth Amendment standards. We therefore remand to the Court of Appeals to address this issue in the first instance.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

APPENDIX C

UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

JOHN J. FELLERS,
Appellant.

No. 01-2045

Submitted: Oct. 16, 2001
Filed: April 8, 2002
Rehearing Denied: May 7, 2002

[285 F.3d 721]

Before: WOLLMAN,[1] Chief Judge, LAY, and RILEY, Circuit Judges.

WOLLMAN, Chief Judge.

John Fellers appeals from the judgment of conviction entered and the sentence imposed by the district court[2] for conspiracy to possess with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. We affirm.

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[1] The Honorable Roger L. Wollman stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the close of business on January 31, 2002. He has been succeeded by the Honorable David R. Hansen.

[2] The Honorable Lyle E. Strom, United States District Judge for the District of Nebraska.

I.

On February 24, 2000, two policemen went to Fellers's Lincoln, Nebraska, home to arrest him for conspiracy to distribute methamphetamine. After Fellers admitted the police to the house, they told him that they were there pursuant to an indictment and that they wanted to discuss his involvement in the use and distribution of methamphetamine and his associations with certain persons. Fellers responded by stating that he had associated with the named persons and that he had used methamphetamine. At no time during this conversation did the police advise Fellers of his *Miranda* rights.

The officers then escorted Fellers to jail, where they advised him of his *Miranda* rights. Fellers signed a written *Miranda* waiver form and agreed to speak with the officers. During this conversation, Fellers reiterated the inculpatory statements made at his home and admitted his association with several more co-conspirators.

Fellers moved to suppress both the inculpatory statements made at his home and those made at the jail. A magistrate judge found that both sets of statements should be suppressed because Fellers was in custody at the time he made the statements at his home, the officers used deceptive stratagems to prompt those statements, and the subsequent statements at the jail would not have been made but for the prior ill-gotten statements. The district court agreed that the statements made at Fellers's home should be suppressed, but admitted the statements made at the jail after finding that Fellers had knowingly and voluntarily waived his *Miranda* rights before making those statements.

The jury found that Fellers had conspired to distribute and to possess with intent to distribute between 50 and 500 grams of methamphetamine. At sentencing, the district court held Fellers responsible for more than 500 grams of methamphetamine and denied Fellers's request for a mitigating role adjustment, as well as his motion for a downward departure. After finding that category II did not adequately reflect the seriousness of Fellers's past criminal conduct, the

district court raised Fellers's criminal history category to III and sentenced him to 151 months' imprisonment.

[724]

II.

Fellers argues that the district court should have suppressed his inculpatory statements made at the jail because the primary taint of the improperly elicited statements made at his home was not removed by the recitation of his *Miranda* rights at the jail.

The voluntariness of a confession is a legal inquiry subject to plenary appellate review. *United States v. Robinson*, 20 F.3d 320, 322 (8th Cir. 1994). To determine if Fellers's inculpatory statements at the jail were voluntary, we must determine if, "in light of the totality of the circumstances, the pressures exerted by the authorities overwhelmed the defendant's will. Coercive police activity is a necessary predicate to finding that a confession is not voluntary in the constitutional sense." *Id.* (citing *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986)) (internal citation omitted).

Contrary to Fellers's contention otherwise, we conclude that *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), renders admissible the statements made by Fellers at the jail. In that case, two officers went to Elstad's residence with a warrant to arrest him for the burglary of a neighbor's home. One of the officers told Elstad that he believed that Elstad had been involved in the burglary, whereupon Elstad responded "Yes, I was there." The officers then transported Elstad to the sheriff's office, where, approximately one hour later, they advised Elstad of his *Miranda* rights. Elstad indicated that he understood his rights and that he wished to waive them. Elstad then signed a written statement explaining his role in the burglary. The trial court suppressed Elstad's initial oral statement, but admitted his written confession. *Id.* at 300-302, 105 S.Ct. 1285. In holding that the statement given at the sheriff's office was admissible, the Court stated:

> It [would be] an unwarranted extension of *Miranda* to hold that simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

Elstad, 470 U.S. at 309, 105 S.Ct. 1285.

Citing *Patterson v. Illinois*, 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988), Fellers argues that the officers' failure to administer the *Miranda* warnings at his home violated his sixth amendment right to counsel inasmuch as the encounter constituted a post-indictment interview. *Patterson* is not applicable here, however, for the officers did not interrogate Fellers at his home.

Finally, we conclude that the record amply supports the district court's finding that Fellers's jailhouse statements were knowingly and voluntarily made following the administration of the *Miranda* warning. *See Elstad*, 470 U.S. at 314-15, 105 S.Ct. 1285; *Robinson*, 20 F.3d at 322. Accordingly, the district court did not err in denying the motion to suppress the statements made at the jail.

III.

Fellers argues that the district court should not have admitted methamphetamine seized from a co-conspirator. We review under an abuse of discretion standard a district court's rulings on the **[725]** admissibility of evidence. We find no abuse of discretion here, for the evidence established that the seized drugs were part of the on-going conspiracy for which Fellers was prosecuted. *United States v. Maynie*, 257 F.3d 908, 915 (8th Cir. 2001).

Fellers next argues that the district court erred in limiting his cross examination of a witness. "Absent a clear abuse of discretion and a showing of prejudice, we will not reverse a district court's ruling limiting cross-examination of a prosecution witness on the basis that it impermissibly infringed [the defendant's] right of confrontation." *United States v. Stewart*, 122 F.3d 625, 627 (8th Cir. 1997). The record reveals that Fellers was allowed to cross-examine the witness about the issues with which he was concerned, and thus we find no abuse of discretion in the district court's ruling.

Fellers contends that the evidence was insufficient to support the verdict. "When reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the verdict and give the government the benefit of all reasonable inferences. We will reverse 'only if a reasonable jury must have had a reasonable doubt that the elements of the crime were established.'" *United States v. Santana*, 150 F.3d 860, 864 (8th Cir. 1998) (quoting *United States v. Carlisle*, 118 F.3d 1271, 1273 (8th Cir. 1997)) (internal quotations and citations omitted). Fellers's argument rests almost entirely on his assertion that the testimony of his co-conspirators was not credible and should have been disregarded. "Assessing the credibility of witnesses is a matter properly left to the jury." *Santana*, 150 F.3d at 864 (citing *United States v. Anderson*, 78 F.3d 420, 422-23 (8th Cir. 1996)). The jury heard testimony from multiple witnesses that they bought from and sold to Fellers methamphetamine, including testimony that the quantities sold to Fellers were sufficient for redistribution to others. This testimony was sufficient to support Fellers's conviction.

Fellers contends that the court erred in denying his motion for a new trial based upon newly discovered evidence.

> We review under an abuse of discretion standard the denial of a motion for a new trial. A defendant is entitled to a new trial based on newly discovered evidence only if he can show (1) that the evidence was not discovered until after the trial; (2) that due

> diligence would not have revealed the evidence; (3) that the evidence is not merely cumulative or impeaching; (4) that the evidence is material; and (5) that the evidence is such as to be likely to lead to acquittal.

United States v. Zuazo, 243 F.3d 428, 431 (8th Cir. 2001) (citing *Lindhorst v. United States*, 658 F.2d 598, 602 (8th Cir. 1981)). Because the new evidence Fellers points to is merely impeachment evidence, the district court did not abuse its discretion in denying the motion.

IV.

Fellers's remaining arguments concern alleged errors committed in calculating his sentence under the Sentencing Guidelines.

Fellers argues that the district court erred in calculating the amount of drugs for which he was responsible. "We review a district court's drug quantity calculations for clear error, and we will reverse only if our examination of the entire record 'definitely and firmly convinces us that a mistake has been made.'" *Santana*, 150 F.3d at 864 (quoting *United States v. Moss*, 138 F.3d 742, 745 (8th Cir. 1998)). The jury found that Fellers was responsible for at least 50 but less than 500 grams of methamphetamine. The district court determined that the quantity of methamphetamine that was reasonably foreseeable **[726]** to Fellers during the course of the conspiracy was more than 500 grams but less than 1.5 kilograms, a finding that we conclude is not clearly erroneous. Fellers argues that even though his sentence does not exceed the statutory maximum allowable under the jury's verdict, the sentence should be reversed because it is based upon a finding of drug quantity that exceeds that found by the jury. Fellers acknowledges that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), does not require such a result, and we decline to extend *Apprendi* to encompass Fellers's situation. As we held in *United States v. Hollingsworth*, 257 F.3d 871, 878 (8th Cir. 2001), it is "proper for the sentencing judge to then make

more exact calculations for purposes of computing the offense level under the guidelines and determining where the sentence will actually fall within the statutory range determined by the jury's verdict."

Fellers contends that the district court erred in finding that his criminal history category did not adequately reflect the seriousness of his past criminal conduct. We review the district court's departure from the Sentencing Guidelines for an abuse of discretion. *United States v. Payne*, 940 F.2d 286, 293 (8th Cir. 1991). The court may depart upward if "reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." U.S.S.G. § 4A1.3. Without recounting the details of Fellers's past criminal conduct, we conclude that the district court did not abuse its discretion in determining that an upward departure was warranted.

Fellers challenges district court's denial of his motion for downward departure. So long as a district court is aware of its authority to depart downward, as it clearly was in this case, its refusal to exercise its discretion to depart from the applicable guideline range is unreviewable, *United States v. Evidente*, 894 F.2d 1000, 1004-05 (8th Cir. 1990), and thus Fellers's challenge fails.

Finally, Fellers argues that the district court erred in denying him a two-level reduction as a minor participant. "[W]hether a defendant qualifies for a minor participant reduction is a question of fact, the determination of which we review for clear error." *United States v. Alverez*, 235 F.3d 1086, 1090 (8th Cir. 2000) (quoting *United States v. Hale*, 1 F.3d 691, 694 (8th Cir. 1993)). Fellers argues that he was less culpable than other participants because the majority of the evidence showed him as receiving the drugs, not distributing them. There was sufficient evidence indicating that Fellers had a larger role in the conspiracy than being a mere user, however, and thus the district court did not err in finding that Fellers was not a minor participant in the conspiracy.

The judgment is affirmed.

RILEY, Circuit Judge, concurring.

In all respects but one, I concur in the Court's well-reasoned opinion. My disagreement, which does not affect the ultimate resolution of this case, concerns whether the arresting officers violated Fellers's right to counsel under the Sixth Amendment.

Because Fellers was under indictment at the time of his arrest, he had a constitutional right to the presence of counsel during police interrogation. *Massiah v. United States*, 377 U.S. 201, 205-06, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). For purposes of this right, an interrogation takes place when agents of law enforcement deliberately attempt to elicit incriminating information from the indicted defendant. *See id.* at 206, 84 S.Ct. 1199. Although the officers in this case did not ask Fellers any questions, they deliberately elicited incriminating **[727]** information by telling Fellers they wanted to discuss his involvement in the use and distribution of methamphetamine. This post-indictment conduct outside the presence of counsel violated Fellers's right to counsel under the Sixth Amendment. *See United States v. Henry*, 447 U.S. 264, 270-71, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980); *Brewer v. Williams*, 430 U.S. 387, 399-401, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); *cf. Rhode Island v. Innis*, 446 U.S. 291, 300-02 & 300 n.4, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).

Nevertheless, I do not believe this constitutional violation takes Fellers's case outside the rationale of *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). The Supreme Court "has never held that the psychological impact of voluntary disclosure of a guilty secret . . . compromises the voluntariness of a subsequent informed waiver." *Id.* at 312, 105 S.Ct. 1285. Fellers knowingly and voluntarily waived his Sixth Amendment rights at the jail, and his subsequent statements were thus admissible at his criminal trial. Accordingly, I concur in the judgment of the Court.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN J. FELLERS,
Defendant.

No. 4:00CR3014

MEMORANDUM AND ORDER

This matter is before the Court on the report and recommendation of the magistrate judge (Filing No. 21, pp. 102-108), the defendant's objection to the report and recommendation (Filing No. 22), and the government's objection to the magistrate judge's report and recommendation (Filing No. 23). Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court has conducted a *de novo* review of defendant's motion, the transcript of the hearing on said motion (Filing No. 21), the magistrate judge's report and recommendation, the objections of the parties, together with their supporting briefs.

The magistrate judge found that the defendant was in custody at the time he made certain statements in his home, that he was not Mirandized and that his statements were in response to statements of the officers which the magistrate judge found to be implicitly questions. The magistrate judge further found that no strong-armed tactics were used, but he did find there was use of deceptive stratagems in that the officers told the defendant the purpose of their visit was to discuss his role in methamphetamine use and distribution when their primary purpose was to arrest him. The magistrate judge concluded that all statements made by the defendant at his home prior to his being taken to the police station and the reading of his *Miranda* rights and all state-

ments made by the defendant at the police station which referred to or addressed the specific individuals who were identified by the officers at defendant's home prior to his formal arrest and transportation to the police station be suppressed.

The government's motion seeks an order from the Court rejecting the magistrate judge's report and recommendation in its entirety and denying defendant's motion to suppress. The defendant's objections specifically seek a clearer definition of the scope of the magistrate judge's order of suppression. The Court finds that the magistrate judge's recommendation is too broad and that it should be accepted by the Court only to the extent that all comments or statements made by the defendant at his home prior to his being taken to the police station should be suppressed. The Court finds that defendant was properly given his *Miranda* warnings, that he acknowledged he understood them and that he knowingly and voluntarily consented to speak with the officers, and, therefore, statements he made thereafter are admissible to the extent that they are relevant to any of the issues in the case.

DISCUSSION

Briefly, the Court notes that on February 24, 2000, Lincoln Police Sergeant Michael Garnett and Lancaster County Deputy Sheriff Jeff Bliemeister, went to the home of John Fellers for the purpose of arresting him (Filing No. 23, p. 7:11-15). They knocked on the door. When defendant responded, they identified themselves and asked if they could come in. The defendant invited the officers in and they all entered the living room of defendant's home. Shortly thereafter, the defendant sat down on the davenport, invited the officers to sit, but they continued to stand. The evidence reflects that the officers then advised the defendant that they were there to discuss his involvement regarding the distribution of methamphetamine, that they had a federal arrest warrant, and that the Grand Jury had indicted him for conspiracy to distribute methamphetamine.

The officers specifically stated that the indictment was regarding his association with persons such as Kathy Kunning, Pat Sardeson, Thomas Geffs, and Mark Farfaı a. The evidence is clear that at that point, Mr. Fellers began offering information regarding personal problems which he had during which he admitted he had been using methamphetamine at the time period he associated with these individuals. Other than the foregoing statements by the officers, no further questions were directed at defendant, nor were any specific questions asked of him regarding his use or distribution of methamphetamine. Subsequently, after about fifteen minutes in the defendant's home, the officers took Mr. Fellers into custody and to the Lancaster County jail where he was booked. The officers testified that after he was booked, they, using a written form, advised him of his rights as required by *Miranda*. They asked each question individually, asking Mr. Fellers to respond either "yes" or "no" to each question. At the conclusion of the reading and advising him of his rights, the defendant and the two officers signed the waiver of *Miranda* rights form (Exhibit No. 1). (See Transcript (Filing No. 21, pp. 16-19)). He thereafter voluntarily gave a statement.

The Court believes that the facts of this case fall squarely within the Supreme Court's holding in *Oregon v. Elstad*, 470 U.S. 298, 84 L.Ed.2d 222, 105 S.Ct. 1285 (1985). In the *Elstad* case, the evidence reflected that the officer had an arrest warrant for Mr. Elstad. When he arrived at the Elstad residence, he sat down with the defendant and asked defendant if he was aware of why he and another detective were there to talk to him. The defendant replied: "No." The officer then asked him if he knew a person by the name of Gross, and the defendant responded: "Yes." The defendant further stated he had heard there was a robbery at the Gross house. At that point, the officer said to Mr. Elstad that he felt that Mr. Elstad was involved in that, and Elstad looked up at the officer and replied: "Yes, I was there." Subsequently, Elstad was escorted to the patrol car, taken to the Sheriffs office and booked. He was then given his *Miranda* warnings, which he indicated he understood,

and having those rights in mind, he indicated he wished to speak with the officers.

The trial court let in defendant's written confession. However, the Oregon Court of Appeals reversed the conviction, and the Oregon Supreme Court refused to review. The Oregon Court of Appeals held that the failure to give the defendant his *Miranda* warnings at his home tainted his subsequent written confession, and accordingly, the Court should have suppressed the use of that confession as evidence. The United States Supreme Court reversed. The Supreme Court noted that the Fifth Amendment prohibits use by the prosecution in its case in chief only of compelled testimony. The Court went on to note that it would be an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, "unaccompanied by any actual coercion or other circumstances, calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process" that a subsequent voluntary and informed waiver is ineffective. The Court then noted:

> Though *Miranda* requires the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

Supra, at p. 309. The Supreme Court further noted:

> We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights.

Id. at 314. The Court concluded:

> We find that the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied in the circumstances of this case by barring use of the unwarned statement in the case in chief. No further purpose is served by importing "taint" to subsequent statements obtained pursuant to a voluntary and knowing waiver.

Id. at 318. In this case, the defendant made a statement at the police station after having been advised of his *Miranda* rights, and the evidence establishes that he made a knowing, intelligent, and voluntary waiver of his *Miranda* rights when he gave his statement to the police. The Court finds the unwarned statements of the defendant made at his home were not coerced so as to taint his subsequent voluntary statement made after he was given the *Miranda* warnings. The Court will adopt the magistrate judge's findings as they related to the unwarned statements made by defendant at his home but rejects the findings as they relate to the subsequent statement made after he received the *Miranda* warnings.

The Court has reviewed the defendant's objections and finds the foregoing discussion resolves those objections, and they will be denied. The Court will adopt in part and reject in part the magistrate judge's report and recommendation. Accordingly,

IT IS ORDERED:

1) The report and recommendation of the magistrate judge is adopted and rejected in accordance with this memorandum opinion.

2) The unwarned statements made by the defendant at his home prior to his being taken to the Lancaster County Sheriffs Office are suppressed.

3) The statements of the defendant given at the police station after he had received his *Miranda* warnings are admissible.

DATED this 8th day of June, 2000.

BY THE COURT:
/s/ Lyle E. Strom
LYLE E. STROM, Senior Judge
United States District Court

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN J. FELLERS,
Defendant.

No. 4:00CR3014
(Filed Apr. 20, 2000)

ORDER

A hearing on the defendants motion to suppress was held before me this date. At the commencement of the hearing the defendant withdrew that portion of the motion concerning the shotguns and rifles in his residence, the government conceding that they would not be used by the government in this case. The hearing proceeded on the remainder of the motion, pertaining to defendant's statements.

At the conclusion of the hearing I read into the record my findings and recommendation. For the reasons stated from the bench at the conclusion of the hearing,

IT THEREFORE HEREBY IS RECOMMENDED to the Hon. Lyle E. Strom, United States Senior District Judge, pursuant to 28 U.S.C. 636(b)(1)(B), that the motion to suppress, filing 13, be GRANTED in the respects noted in my comments on the record, and DENIED in all other respects.

FURTHER, IT HEREBY IS ORDERED:

1. This report and recommendation shall be deemed to be filed at the time the transcript of the hearing is filed with the clerk.

2. When the transcript of this hearing is filed, the clerk shall immediately notify the attorneys for the parties.

3. The parties are notified that any failure to file an objection to this report and recommendation within the time permitted by the local rules may be deemed a waiver of the right to appeal the trial judge's adoption of this report and recommendation.

4. That portion of the motion to suppress, filing 13, which addresses firearms found at the defendant's residence, is deemed withdrawn.

Dated April 20, 2000.

BY THE COURT:
/s/ David L. Piester
United States Magistrate
Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN J. FELLERS,
Defendant.

No. 4:00CR3014
(Filed May 2, 2000)

HEARING ON DEFENDANT'S MOTION TO SUPRESS

Hearing held before the HONORABLE DAVID L. PIESTER, United States Magistrate Judge, on April 20, 2000 in Lincoln, Nebraska.

* * * *

[102] . . . THE COURT: Well, the principal issues before the Court in regard to the motion to suppress are, first of all, whether or not the defendant was in custody at the time of the statements made in his home at the time of his visit by Detective Garnett and Deputy Bliemeister.

The factors that I have to consider in determining whether or not the defendant was in custody at that time are stated in *United States v. Griffin*, 922 F 2nd 1343, which is an Eighth Circuit case in 1990. The first one is whether the suspect was informed at the time of questioning that the questioning was voluntary, that the subject – suspect was free to leave or request the officers to do so or that the suspect was not considered under arrest. Obviously, that's not applicable here.

Second, whether the suspect possessed unrestrained freedom of movement during questioning and Deputy Blie-

meister said that he was not free to move around. And that was confirmed by Detective Garnett.

Whether the suspected – excuse me, whether the suspect initiated contact with authorities. He did not. Or voluntarily acquiesced to official requests to respond to questions. The request was an official request to talk. It wasn't to respond to questions explicitly. But implicitly, it was.

[103] Whether strong arm tactics or deceptive stratagems were employed during the questioning, I do not see that there was any strong arm tactic involved at all; however, the use of detective stratagems is another matter. There were no deceptions as such, but when the officers arrived, Detective Bliemeister said that the purpose of their visit was to discuss with the defendant his role in methamphetamine use and distribution. That was not a true statement. Their purpose was to arrest him. In addition, Detective Garnett stated we need to talk with you about your involvement in methamphetamine use or distribution. Again, while that's not altogether untrue, it does not reflect truthfully the purpose of their visit.

The next factor is whether the atmosphere of the questioning was police dominated, and I find that it was police dominated. They had, at that time, arrested him. I find specifically that Deputy Bliemeister did advise him that either he was arrested or they had a warrant for his arrest in the course of his initial contact and comment to the defendant.

The last factor is whether the suspect was placed under arrest at the termination of the questioning. Obviously, he was arrested before that.

One other thing: With regard to the arrest, **[104]** there was a notable lack of testimony that at the conclusion of their conversation the officers arrested the defendant. Both of them testified that the comment that was made was simply we need to go now, John, and take you to the jail. If they had not previously advised him that he was under arrest or if it were not clear that he was under arrest, then they would have had to have explained that statement and to ex-

plicitly arrest him at that time. There was no testimony that they did.

I therefore find that he was under arrest at the time of all of the statements made. He was definitely in custody under the considerations of *Griffin*.

The next question is whether or not he was interrogated. The applicable test is from *Rhode Island v. Innis* (ph). And, as stated by Mr. Brennan, it is whether or not the comment made was designed to elicit a response. I find that it was. First of all, it is telling, I think, that the first statement made was, we need to talk with you – or we want to talk with you about your involvement in methamphetamine distribution or use. I don't know how that could be anything except designed to elicit a response. It certainly was worded in a way that one would expect a response. Deputy Bliemeister said that he was not surprised that it got a **[105]** response.

In addition, it was, again, as Mr. Brennan mentioned, unnecessary for him to say what the indictment was all about specifically mentioning individuals which incident – who incidently [sic] are not mentioned in the indictment. I cannot believe that that mentioning of individuals was stated for any purpose other than to get a response in relation to those individuals, and I so find.

The next question is since he was not Mirandized and since he was interrogated while he was in custody, how much needs to be suppressed. The defendant states that everything involved in the – in the comments made by the defendant should be suppressed, even those subjects which were repeated at the jail. I must decide whether or not the subjects that were first broached at the home and later discussed in detail at the jail – I guess the issue is whether or not there was something in between to attenuate the primary taint, as the clause goes. There was no evidence in that regard, directly. There was evidence that they took him immediately to the jail; he was booked in. I think I can take judicial notice of the fact that wherever this address is in Lincoln, Nebraska, it's probably no more than 20 minutes

away from the jail. So I think that its fair to **[106]** conclude that this conversation took place approximately a half hour after the officers and the defendant left his home.

He was Mirandized at this time and I also find that he voluntarily agreed to talk with the officers at that time.

Obviously, the subjects that were mentioned for the first time at the jail and the defendant's comments regarding those subjects need not be suppressed. My notes indicate that the individuals Ernie Lawrence, Valerie Green, Leon Thompson, Shelly Farfalla were first mentioned at the jail. Also the subject of the defendant's involvement in distribution of methamphetamine was first mentioned at the jail. And also the subject of the defendant fronting money for the purchase of methamphetamine was mentioned first at the jail.

With respect to the individuals that were mentioned and the fact that by answering, the defendant acknowledged that he knew those individuals and by stating that at that period of time, he was having personal problems and was using meth, thereby incriminating him and connecting the meth with the individuals, that must be suppressed. And I shall recommend that all of the comments made by the defendant **[107]** at the home be suppressed as well as any comments regarding those specific individuals elicited at the time of the interview in the jail be suppressed. That would be the three individuals: Kathi Kuenning, Pat Sardeson and Thomas Geffs, otherwise known as Slick.

There's no information by which I can find that the primary taint of the initial interrogation by the officers was removed by any time or any other activity between the time of the initial statement – interrogation and statement and the time of the subsequent interview in the jail.

Therefore, it will be recommended – is recommended to the trial judge pursuant to 28 USC 636b(1)(b) that the motion to suppress be granted in these respects and denied in all other respects. I shall order that at the time the transcript of this hearing is filed that will be deemed the filing of the report and recommendation. I will direct the clerk to

notify counsel of that filing and at that time we'll commence the ten-day limitation for filing objections. Either side or both sides may file objections. After they have been responded to, the matter will go before the trial judge for a decision.

Is there anything else that we should address regarding this case today?

[108] MS. LIPOVSKY: Is this – no.

THE COURT: All right.

MR. BRENNAN: I'm sorry. Did you mention the name Mark Farfalla in – you said three names, and there were actually four names that were mentioned, by Bliemeister at the home and the fourth name was Mark Farfalla.

THE COURT: Let me check my notes on that. I did not write that – that name down as I was taking notes. If, in the transcript, that name is mentioned as having been mentioned at the home for the first time, then my recommendation would include that name as one of the subjects to be suppressed. All right.

If there's nothing else, we'll be in recess.

MR. BRENNAN: Thank you.

(end of proceedings)

* * * *

[109] TRANSCRIBER'S CERTIFICATE

I hereby certify that the previous pages reflect truly, accurately and completely the recording of this proceeding as transcribed by me to the best of my ability.

In testimony whereof, I have hereunto set my hand this 29th day of April, 2000.

/s/ Karen Mason
Transcriber – Karen Mason

Supreme Court, U.S.
FILED
SEP 8 - 2005
OFFICE OF THE CLERK

No. 04-1552

In the Supreme Court of the United States

JOHN J. FELLERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

1. Whether statements that petitioner made after receiving and voluntarily waiving his *Miranda* rights should have been suppressed under the Sixth Amendment as the fruits of earlier unwarned and uncounseled post-indictment questioning.

2. Whether the court of appeals erred by concluding that any error in the admission of petitioner's statements was harmless beyond a reasonable doubt.

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JOHN J. FELLERS, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 397 F.3d 1090. A prior opinion of the court of appeals (Pet. App. 23a-30a) is reported at 285 F.3d 721. The order of the district court (Pet. App. 31a-36a) and the report and recommendation of the magistrate judge (Pet. App. 37a-38a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 2005. The petition for a writ of certiorari was filed on May 16, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted of conspiring to distribute methamphetamine and to possess methamphetamine with the intent to distribute it, in violation of 21 U.S.C. 846. The district court sentenced petitioner to 151 months of imprisonment, to be followed by a four-year term of supervised release. The court of appeals affirmed. Pet. App. 23a-30a. This Court reversed and remanded. *Id.* at 17a-22a. On remand, the court of appeals again affirmed petitioner's conviction, but remanded his case for resentencing in accordance with *United States* v. *Booker*, 125 S. Ct. 738 (2005). Pet. App. 1a-15a.[1]

1. On February 24, 2000, after a federal grand jury indicted petitioner for conspiring to distribute and possess with intent to distribute methamphetamine, two police officers went to petitioner's home in Lincoln, Nebraska, to arrest him. One of the officers told petitioner that he was there to discuss petitioner's involvement in methamphetamine distribution. The officer told petitioner that he had a federal warrant for petitioner's arrest and that a grand jury had indicted him for conspiracy to distribute methamphetamine with "persons such as Kathi Kuenning, Pat Sardeson, Thomas Geffs, and Mark Farfalla." Pet. App. 33a; *id.* at 18a. As petitioner sat on his sofa sipping from a mug, see *id.* at 32a; Suppression Hearing Tr. 11, 43-44, petitioner implicitly acknowledged that he knew the four people the officers named by indicating that at the time he had associated with them, he had been going through a variety of finan-

[1] On May 2, 2005, the district court sentenced petitioner to a term of 102 months of imprisonment. Pet. 11 n.*.

cial and personal problems, among them methamphetamine use. He did not, however, link them with drug distribution. See Pet. App. 33a; see also *id.* at 18a; Suppression Hearing Tr. 84. The officers then arrested petitioner and transported him to the county jail. Pet. App. 1a, 18a. During the approximately 20-minute ride, the officers asked petitioner no questions. See *id.* at 33a, 41a.

At the jail, the officers advised petitioner of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), including his right to consult with a lawyer. Petitioner orally waived his rights and signed a written waiver-of-rights form. Petitioner then explicitly acknowledged that he knew Kuenning, Sardeson, Geffs, and Farfalla, admitted that he also had associated with other individuals whom he had not previously identified (Val Green, Leon Thompson and Ernie Lawrence), and said that he had purchased methamphetamine from Kuenning and Sardeson for personal use. See Pet. App. 2a, 42a. Petitioner also admitted that he had loaned money to Kuenning, even though he suspected that the money might have been used for drug transactions. See *id.* at 2a, 18a. Petitioner repeatedly denied that he had ever sold methamphetamine and denied that he had purchased methamphetamine from Sardeson or Kuenning in quantities sufficient for resale. See *ibid.*

2. Before trial, petitioner moved to suppress both the statements he had made at his home, in the absence of *Miranda* warnings, and his subsequent statements made at the jail. The district court granted the suppression motion as to the statements that petitioner made at his home, adopting the findings of the magistrate judge that petitioner was in custody at the time of the statements at his home and that the statements were made in

response to remarks of the officers which were "implicitly questions." Pet. App. 31a; see *id.* at 32a, 35a. The district court declined, however, to suppress petitioner's subsequent statements at the jail. The court reasoned that because petitioner voluntarily made the jailhouse statements after waiving his *Miranda* rights, those statements were admissible under *Oregon* v. *Elstad*, 470 U.S. 298 (1985), which held that, although *Miranda* requires that an unwarned statement be suppressed, the admissibility of any subsequent statement made after administration of warnings turns solely on whether it is knowingly and voluntarily made. Pet. App. 33a-35a (citing *Elstad*, 470 U.S. at 309). The district court concluded that "the unwarned statements of [petitioner] made at his home were not coerced so as to taint his subsequent voluntary statement made after he was given the *Miranda* warnings." *Id.* at 35a.

Statements from petitioner's jailhouse interview were admitted into evidence at trial, along with testimony from seven cooperating witnesses who testified about methamphetamine transactions involving petitioner. See Pet. App. 13a; Gov't Supp. C.A. Br. 16-19. The jury found petitioner guilty of conspiring to possess and distribute methamphetamine. Pet. App. 2a.

3. The court of appeals affirmed. Pet. App. 23a-30a. Petitioner contended that the statements at his home were obtained in violation of his Sixth Amendment right to counsel under *Patterson* v. *Illinois*, 487 U.S. 285 (1988), and that his jailhouse statements should have been suppressed as fruits of the Sixth Amendment violation. The court rejected that claim, finding *Patterson* "not applicable" because "the officers did not interrogate [petitioner] at his home." Pet. App. 26a. The court also concluded that petitioner's jailhouse statements

were properly admitted under *Elstad*. The court found that the record "amply support[ed]" the district court's finding that petitioner's jailhouse statements were voluntary and thus admissible. *Id.* at 25a-26a. In a concurring opinion, Judge Riley expressed his view that, during the arrest at petitioner's home, the police officers violated petitioner's Sixth Amendment rights by "deliberately eliciting" incriminating information from him without counsel present, but that the jailhouse statements were admissible under the rationale of *Elstad*. *Id.* at 30a.

4. This Court reversed, holding that the officers "deliberately elicited" the statements that petitioner made at his home in violation of "the Sixth Amendment standards established in *Massiah* [v. *United States*, 377 U.S. 201 (1964)] and its progeny." Pet. App. 21a. The Court stated that the court of appeals had erred in holding that the absence of "interrogation" foreclosed petitioner's Sixth Amendment claim that the jailhouse statements should have been suppressed as fruits of the statements taken from petitioner at his home, because the proper Sixth Amendment test turns on deliberate elicitation, which is not the same as interrogation. *Ibid.* The Court remanded for the court of appeals to determine whether petitioner's jailhouse statements should be suppressed as fruits of the earlier statement and to address "whether the rationale of *Elstad* applies when a suspect makes incriminating statements after a knowing and voluntary waiver of his right to counsel notwithstanding earlier police questioning in violation of Sixth Amendment standards." *Id.* at 21a-22a.

5. On remand, the court of appeals again affirmed petitioner's conviction. Pet. App. 1a-15a. The court held that the rationale in *Elstad* applies in the Sixth Amend-

ment context, reasoning that "[b]oth the deterrence of future Sixth Amendment violations and the vindication of the Amendment's right-to-counsel guarantee have been effectuated through the exclusion of [petitioner's] initial statements." *Id.* at 7a. "In the case of warned confessions that follow unwarned, uncounseled statements," the court stated, "the suspect's knowing, intelligent, and voluntary choice to waive his right to counsel constitutes an intervening act of free will that breaks the causal link between the prior uncounseled statements (which have already been suppressed) and the subsequent statements." *Id.* at 8a. The court noted the "similarities between the Sixth Amendment context at issue in [petitioner's] case and the Fifth Amendment context at issue in *Elstad*," explaining that "there is no significant difference between a lawyer's usefulness to a suspect during pre-indictment custodial interrogation and his usefulness at post-indictment questioning." *Id.* at 8a-9a (citing *Patterson*, 487 U.S. at 298-299).[2]

The court also held that even if petitioner's jailhouse statements should have been suppressed, "any error in

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[2] The court also concluded, based on a "multi-factor test derived from" the plurality opinion in *Missouri* v. *Seibert*, 124 S. Ct. 2601 (2004), that "the officers' conduct in this case did not vitiate the effectiveness of the *Miranda* warnings given to [petitioner]." Pet. App. 11a. The court emphasized that in this case and unlike in *Seibert*, the statements were separated in time, took place "in a new and distinct setting," and the subject of the statements overlapped only "to a small degree with his initial unwarned * * * admissions." *Ibid.* In addition, the court found "no evidence that the officers in this case employed * * * a deliberate strategy" to obtain incriminating statements in violation of *Miranda*, and therefore concluded that "the concerns voiced by Justice Kennedy" in his concurring opinion in *Seibert* were not implicated. *Id.* at 12a (citing *Seibert*, 124 S. Ct. at 2614 (Kennedy, J., concurring in the judgment)).